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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1954.

No. 340.

LAURA B. HOPKINS, Administratrix of the Estate of Howard T. Hopkins, Deceased,

Petitioner,

vs.

E. I. DuPONT de NEMOURS and COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

C. BREWSTER RHOADS,
GEORGE G. CHANDLER,
RICHARD E. McDEVITT,
1500 Morris Building,
Philadelphia 2, Pa.

PETER J. NOLAN,
Wilmington, Delaware.

Attorneys for Respondent.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO BRIEF.

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	5
1. The Court of Appeals Was Right in Concluding That There Was No Evidence in the Record Sufficient to Go to the Jury on the Issues of Defendant's Alleged Negligence	5
2. There Is No Conflict Between the Two Opinions by the Court of Appeals in This Case; Nor Is There Any Conflict in Either Opinion With the Law of Pennsylvania	9
3. The Present Case Is Not the Proper Forum for Petitioner's Attack Upon the Court of Appeals' Interpretation and Exercise of its En Banc Power	13
CONCLUSION	14

INDEX OF CASES CITED.

	Page
Johnson v. B. & O. R. Co., 208 Fed. (2d) 633 (1954)	8
Textile Mills Securities Corp. v. Commissioner of Internal Revenue, 314 U. S. 326 (1941)	13
Western P. R. Corp. v. Western P. R. Co., 345 U. S. 247 (1953)	13

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

QUESTION PRESENTED.

In reversing the judgment for plaintiff did the Court of Appeals rightly conclude that there was no evidence to show that the fatal accident was proximately caused by defendant's negligence?

STATEMENT OF THE CASE.

The decedent Hopkins was a dynamite loader employed by C. J. Langenfelder & Sons, Inc., a contracting firm then building a portion of the Pennsylvania Turnpike. On the day of the accident some 300 boreholes were drilled in a rocky hill for the purpose of bringing the roadway to grade through blasting. The drilling pattern called first for the drilling of the boreholes five feet apart. A crew of loaders then placed dynamite and blasting caps in the boreholes, tamped them down, filled the holes with dirt and tamped them down, and connected the wires from each borehole to a trunk line so that the entire series could be electrically detonated simultaneously (21-24, 33, 50, 60-62a).

That morning, drilling began about 7 o'clock but loading did not start until about 10. By afternoon the loaders caught up to the drillers and thereafter worked right behind them—there being an interval of approximately four or five minutes between the completion of the drilling of a borehole and the beginning of its loading (94-95a).

At about 5 or 5:30, the decedent was seen loading the fatal hole and tamping it. There was a drill operating within ten feet of it. The dynamite in the hole exploded and he was killed (34-35, 41-42, 51-52, 66, 95-97, 121-23a).

Plaintiff conceded that the dynamite and the blasting caps were in no way defective or sub-standard (135a). The theory of plaintiff's case was that the premature explosion was caused by heat generated in the borehole in the normal course of drilling, or by vibration from the nearby drilling, or a combination of the two—plaintiff did not and could not specify which one; and that defendant was negligent in failing to give adequate warning of such dangers (223-26a). It was recognized at the second trial that defendant's alleged duty to warn would be legally discharged by warning the contractor or his blasting foreman, Russell E. Keller (39, 40, 71, 72a).

Keller was an experienced blaster who had worked with dynamite and blasting on a great many construction jobs over a period of 25 years. He was called by plaintiff. He stated that the five-foot drilling pattern and the method of loading, both of which had been continuously used on this job before and after the accident, were usual and customary; that the nearest drill working at the time of the explosion was ten feet away, but that according to the pattern there were loaded boreholes five feet to the right, left and behind, none of which exploded. He asserted that this was the first accident of the kind that he had ever seen in his many years of blasting (33, 50-52, 54-56, 74, 77a).

As blasting foreman, Keller supervised the loaders and instructed them in safety measures. He specifically warned them to check boreholes before loading in order to see if they were hot; told them to use their tamping pole and leave it in the borehole for three or four minutes to test and judge the heat. This had been his practice for twenty-five years (20, 27-28, 44, 46-48, 49, 67, 73-74a).

Being conversant with the danger of heat in boreholes, Keller did not want his loaders to put a charge of dynamite on top of a hot hole. In his opinion a temperature of 200 degrees Fahrenheit would be hot enough to explode dynamite (73-74a).

Keller had been warned by mine inspectors in the coal fields of the danger caused by the vibration from drilling too close to loaded holes (75-76a). He stated that proper procedure required that in loading boreholes the loader should keep back two or three holes from the one being drilled (Joint Appendix, First Appeal: 52-53a).

Witnesses for both plaintiff and defendant testified without contradiction that the pattern and procedure of drilling and blasting used on this job was customary, usual and generally considered safe (33, 55-56, 77, 128, 136, 285, 338-39, 415a); and that no other loaded hole on this job exploded at the time of the accident (54, 120-21, 138-39a).

There was no evidence of a similar explosion on this job or any other one.

Through the cross-examination of plaintiff's witnesses and the direct examination of defense witnesses, it was established that the contractor, the blasting foreman and the blasting workers had adequate information about the dangers of heat and vibrations in boreholes (pp. 3-4 ante); that the explosion was caused by the negligent loading of a borehole containing a hot broken bit, which affirmative evidence was uncontradicted (275-81, 417-18, 422-23a); and that on this job bits often got hot and sometimes broke, that drillers were instructed to fill the hole whenever the broken bit could not be readily withdrawn, and that the steel shaft of a broken drill was found in the immediate vicinity of the exploded hole (79-83, 88-89, 91, 97, 129, 136, 285-86a). By the testimony of its trained experts, defendant showed that every precaution had been taken in the manufacture of the dynamite and blasting caps and that comprehensive field and laboratory tests proved that the explosion which resulted in Hopkins' death could not have been caused by heat or vibration from drilling, but was due to a hot broken bit in the exploded hole (294-98, 300-06, 309-18, 321-62, 402-18a).

The jury brought in a verdict of $35,000. for plaintiff, upon which judgment was entered. The trial judge dismissed without opinion the defendant's motions to set aside the verdict and for a new trial (510a).

ARGUMENT.

This brief will first demonstrate that the Court of Appeals committed no error in reversing the judgment for plaintiff because there was no evidence in the record showing that defendant's negligence proximately caused the accident; and will then answer the several specious reasons relied upon by petitioner for granting the writ of certiorari.

1. The Court of Appeals Was Right in Concluding That There Was No Evidence in the Record Sufficient to Go to the Jury on the Issues of Defendant's Alleged Negligence.

The opinion of the Court of Appeals first lays down the principle that in a negligence case the plaintiff must show "a known or foreseeable hazard against which the defendant should have guarded, by warning or otherwise, but did not"; and must prove that "the user of the dynamite, in this case a contractor represented on the job, would not and did not have adequate information about" the hazard, which in this case was the "heat hazard involved in the customary procedure of loading almost immediately after drilling" (Appendix A, 2a-3a). The petition for certiorari concedes that the burden of establishing lack of such knowledge was rightly upon the petitioner (pp. 9-10).

Upon the issue of the user's information or lack of information about the heat hazard, the uncontradicted testimony of blasting foreman Keller during examination by the trial judge after that of counsel showed not only that he knew that there would be enough heat in the borehole to explode the dynamite, but also that he had been informed by people whom he considered reliable of the existence of that heat hazard (74-75a). His testimony further showed that he had been told by mine inspectors about the danger of explosion from shock and vibration by drilling close to a charged hole (75-76a).

As a consequence, Keller instructed his loaders to test each borehole for heat for three to four minutes before loading and to keep back two or three holes from the one being drilled, which safety procedures were not observed on the afternoon of the accident (p. 2, ante).

The Court of Appeals in its opinion therefore concluded that there was no evidence that the user was uninformed of the heat hazard, but to the contrary "the only affirmative evidence on this issue showed that the foreman had such information, believed the very temperature which plaintiff claims to have existed here would have been dangerous, and directed such precautions as he deemed adequate to prevent the loading of dynamite in a dangerously hot hole. It follows that defendant cannot be held liable if this accident was caused by disregard of the heat hazard thus known to have been incidental to drilling in hard rock" (Appendix A, 5a).

Apropos of the heat hazard, the opinion observed that it was noteworthy that there was no testimony and no basis for an inference that a dynamite charge had ever before been detonated by the heat which drilling generates in a borehole; and that to the contrary there was affirmative evidence of witnesses of many years experience that they did not know of any such occurrence (Appendix A, 3a). The opinion might well have also observed that in addition to the 300 holes drilled and loaded on the day of the accident, many thousands of other holes were drilled and loaded on this job under the same pattern of drilling and loading without any premature explosion. These two noteworthy and uncontradicted facts provide a cogent and complete answer to the unwarranted attempt in the petition for certiorari to discredit the qualifications and safety precautions of Keller and the reliability of his testimony (pp. 16-20). There is no merit to the unsupported contention by the petitioner that from the very nature of things testimony in rebuttal of these two noteworthy facts was unavailable to plaintiff.

The opinion of the Court of Appeals next pointed out that the evidence of plaintiff's expert comprehended other possibilities regarding the cause of the accident. He stated as his opinion that heat or vibration or both caused the accident. The hypothetical question is then posed by the Court that the jury might have concluded that defendant should have warned of the vibration danger involved in drilling too close to a loaded hole. This question overlooks the uncontradicted testimony of Keller that he had been warned of the danger of drilling too close to a loaded hole and had prescribed precautionary measures against it, which measures were disregarded on the afternoon of the accident by the loaders following right on the heels of the drillers (p. 2 ante).

However, the Court of Appeals took note that this hypothetical issue would not help plaintiff because the plaintiff's own evidence of the cause of the accident "merely presented alternative possibilities with no basis for a reasoned choice among them. And we already have shown that on the present record defendant cannot be blamed for at least one of these alternatives" (i.e., heat hazard) (Appendix A, 5a).

In addition to the alternative heat and vibration dangers, either or both of which plaintiff's expert opined caused the accident, the opinion of the Court of Appeals notices the substantial and uncontroverted proofs by defendant that a hot broken drill bit negligently left in the hole caused the explosion. The petition for certiorari ignores this competent and reliable evidence of the cause of the accident, for which defendant was not responsible and yet which constituted another alternative possibility for the jury to venture a guess in determining the cause of the accident.

The opinion thereupon invokes the well established principle of the Pennsylvania law of negligence that where, as here, the plaintiff's evidence supports an inference that

excludes liability of the defendant, just as strongly as an inference that comprehends liability, a jury "may not engage in speculation and conjecture in order to attribute the accident to one rather than the other" (Appendix A, 5a-6a). In other words, where, as here, the injury may have been caused by different possible grounds for some of which defendant is concededly not responsible, the jury may not be allowed to guess and speculate as to the cause of the accident, and a verdict must be directed for defendant. The numerous Pennsylvania cases establishing this general proposition are cited in the opinion. These decisions cannot be and are not questioned by the petitioner.

In an attempt to evade the damaging effect of Keller's testimony showing his knowledge of the dangers from heat and vibration, which testimony was a complete bar to the imposition of a duty on defendant to warn against them, the petition for certiorari asks this Court to reject such testimony in toto or to construe it as indicative of the inadequacy of Keller's knowledge (pp. 12-20).

The petition cites *Johnson v. B. & O. R. Co.*, 208 Fed. (2d) 633 (1954), and then contends that if under its authority Keller's testimony is rejected the record is not left barren of evidence on the issue of knowledge, but "leads, of necessity, to the conclusion that the *users* were, in fact, ignorant of the dangers and of the proper precautions to be taken" (pp. 12-14). The *Johnson* case is distinguishable from the present case upon the fundamental ground of the witness' bias. In this wrongful death action against a railroad for the fatal shooting of plaintiff's decedent by a railroad policeman wherein the railroad contended that the policeman shot in self defense, plaintiff called the policeman as a witness. His testimony that he shot to save his own life was naturally biased in favor of establishing his innocence of any crime, whereas Keller was not an employee of defendant and had no self interest whatever to influence his veracity. Moreover, the ignoring of Keller's testimony

will be fatal to plaintiff's cause of action which admittedly depended upon affirmative proof that neither the contractor nor his blasting foreman had knowledge of the dangers from heat and vibration before a duty could be imposed upon defendant to warn against such dangers.

This fallacious attempt to reject Keller's damaging evidence constitutes an inconsistent reversion by plaintiff to the position she had taken at the first trial that the basis of the duty to warn was predicated upon a lack of knowledge of these dangers on the part of the blasting workers as the alleged "users", an erroneous position which plaintiff abandoned at the second trial for the correct position that the duty to warn must be founded wholly upon proof of a lack of knowledge on the part of the user, to wit, the contractor and his blasting foreman Keller, who purchased the dynamite from defendant and was solely charged with its safekeeping and use.

The best evidence of the sufficiency of Keller's information and precautionary measures is the undisputed fact that no similar accident occurred either on this job or on the many other construction jobs during his twenty-five years of blasting experience. Besides, the practices and measures he adopted and followed on this particular job were usual, customary and generally considered to be safe. Plaintiff's indictment of Keller is an unwarranted attack upon the latter as well as the blasting industry.

2. There Is No Conflict Between the Two Opinions by the Court of Appeals in This Case; Nor Is There Any Conflict in Either Opinion With the Law of Pennsylvania.

Despite the opening admission that the trial judge correctly laid down and applied in both trials the legal principle that the plaintiff had the burden of proving the user's lack of knowledge of the dangers of heat and vibration, either or both of which the plaintiff's expert testified caused

the accident, as a prerequisite to holding the defendant responsible for the accident, the petition for certiorari claims that the Court of Appeals in its second opinion reversed the position previously taken on this issue of law in its first opinion. This claim of inconsistency is grounded upon a momentary revival of petitioner's initial misapprehension regarding who was the "user" whose ignorance should be taken as the criterion for imposing a duty to warn.

The first opinion (Appendix B, 11a-13a) dealt solely with the lack of knowledge of the dangers on the part of the blasting workers. There was no affirmative evidence in the first case that the blasting foreman was well aware of these dangers. Consequently, the Court in a footnote to its opinion (13a) inferentially draws from Keller's testimony the erroneous conclusion that it indicates that he, a man with twenty-five years experience in dealing with dynamite, was unaware of the dangers of heat and vibration. From this erroneous conclusion the Court argues that if this experienced man did not know of the dangers, the less experienced blasting workers would certainly be ignorant of them.

But at the second trial there was affirmative evidence by Keller of his knowledge of the two dangers (74-76a), which testimony was brought out by the trial judge on examination of Keller in furtherance of the theory of liability under which the second trial was conducted with the approval and consent of counsel for plaintiff and defendant, namely, that it was incumbent upon plaintiff to show that defendant realized or should have realized that the blasting foreman who supervised these operations for the contractor, the user of the dynamite, would not recognize and was ignorant of the heat and vibration dangers, which caused the accident according to the plaintiff's expert witness (39, 40, 71, 72a).

There is no inconsistency between the two opinions, but there is a world of difference in the respective proofs before the Court of Appeals in the two cases upon the user's

lack of knowledge of the dangers. The record in the first trial is barren of any affirmative evidence of the user's lack of knowledge and the erroneous inference was drawn that the blasting foreman, Keller, was not aware of the dangers from heat and vibration. At the second trial there was uncontradicted affirmative evidence by Keller that he was fully informed as to these dangers and had accordingly taken measures which he and the blasting industry considered safe and customary.

The different conclusions reached by the two opinions resulted solely from the basic difference in the proofs regarding lack of knowledge of the dangers. This is pointed out in the second opinion reading in pertinent part (3a):

> "• • • On the first appeal, we believed that a jury might reasonably have concluded that the defendant should have given some warning of this danger because it appeared that blasting workers and those supervising their operations, both generally and in this very case, were uninformed of the heat hazard involved in the customary procedure of loading almost immediately after drilling. However, on the present record we reach a different conclusion."

The petition for certiorari does not question the correctness of the law of Pennsylvania as laid down and applied by the Court of Appeals regarding the two issues that (1) the plaintiff had the burden of proving a lack of information and knowledge of the dangers of heat and vibration on the part of the contractor and its blasting foreman, the user of the dynamite, and (2) the jury should not and may not be permitted to engage in speculation and conjecture as between suggested causes of the accident. Nor does it question in any manner the many Pennsylvania decisions cited in the opinion to sustain the Court's interpretation and application of these decisions to the law of the case. The petition admits that the verdict was correctly set aside

if the Court of Appeals was right in its conclusion regarding the heat hazard. The sole complaint is that under the *Johnson* case the testimony of Keller was not binding upon plaintiff and, if rejected, the record was not barren of evidence on the issue of the user's knowledge of the two dangers and warranted of necessity the inferential conclusion that the user was in fact ignorant of the dangers and of the proper precautions to be taken. This factual contention has already been answered (pp. 10-11 ante).

There was no departure from the accepted and usual course of judicial proceedings such as would call for this Court's power of supervision. That the second opinion in this case did not create a conflict within the Circuit and did not reverse the law of the case as established on a prior appeal, has already been proven unsound (pp. 10-11 ante). This illusory claim forms the sole basis for the equally misleading claim that there has been such a far-reaching departure from the accepted and usual course of judicial proceeding as to call for this Court's power of supervision. As a consequence, the plaintiff's exegesis about the disruptive influence of intra-circuit conflicts is entirely irrelevant and inappropriate.

The petition for certiorari asserts that the second opinion was by a different panel of judges from that rendering the first opinion. This assertion overlooks the fact that Circuit Judge Staley, who wrote the first opinion, was also a member of the panel which delivered the second opinion. Further, it is to be assumed that the procedure outlined by Circuit Judge Maris (14 F. R. D. 91) was followed, under which the draft of the opinion by Circuit Judge Hastie would customarily be circulated among the six other Circuit Judges and under which the petition for rehearing would likewise be circulated. Under such circumstances an intra-circuit conflict could not exist and may not here properly be suggested.

The petition for certiorari claims that the present case calls for the en banc procedure sustained by this Court in

Textile Mills Securities Corp. v. Commissioner of Internal Revenue, 314 U. S. 326 (1941) and *Western P. R. Corp. v. Western P. R. Co.*, 345 U. S. 247 (1953) in order to obtain a harmony of decisions in the present case. For the several reasons already stated, such procedure has not only been heretofore followed in this case, but could also serve no possible purpose again.

3. The Present Case Is Not the Proper Forum for Petitioner's Attack Upon the Court of Appeals' Interpretation and Exercise of Its En Banc Power.

Using as a springboard its unsound contention that the Court of Appeals erroneously exercised its en banc powers in denying a re-hearing in this case, the petition for certiorari launches forth in a vague and incomprehensible attack upon the authority of Judge Maris to publish a statement on "The Procedure of the United States Court of Appeals for the Third Circuit on Hearing and Rehearing Cases En Banc" which appears in 14 Federal Rules Decisions 91-97, and then expounds the petitioner's personal views upon the need for implementing, clarifying and establishing en banc procedure as a rule of court. Counsel for defendant deems it fitting to ignore these collateral and unlitigated dissertations of the petition for certiorari (pp. 26-31) except for the final conclusion (p. 31) that "We earnestly believe that unless this Court consents to exercise its supervisory powers in these directions, a serious and unnecessary miscarriage of justice will be perpetuated". This belief is in no wise justified in respect of this case and is indicative of the extreme lengths to which zealous counsel will go in conjuring up ill-founded and far-fetched reasons to obtain a writ of certiorari.

CONCLUSION.

We respectfully submit that the present case has been fairly and impartially tried at every stage; that no error prejudicial to the plaintiff's alleged cause of action was committed; that plaintiff failed to offer evidence sufficient to go to the jury upon the defendant's responsibility for the fatal accident; and that for the many reasons above stated the petition for certiorari should be denied.

Respectfully submitted,

C. Brewster Rhoads,
George G. Chandler,
Richard E. McDevitt,
Peter J. Nolan,
Attorneys for Respondent.